UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TOYS "R" US – DELAWARE, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-283-B
	)	
OFFICEMAX, INC.,	)	
	)	
Defendant	)	

MEMORANDUM OF DECISION[1]

Plaintiff, Toys "R" Us—Delaware, Inc. ("Toys"), has sued OfficeMax, Inc. ("OfficeMax"), for breach of contract, alleging that OfficeMax failed to honor the terms of a lease agreement between the parties dated May 6, 1998. The parties have now filed cross-motions for summary judgment. (Docket Nos. 7 & 9). For the reasons explained below I will GRANT Plaintiff's Motion for Summary Judgment and DENY the Defendant's Motion.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[A] 'material' fact is one that might affect the outcome of the suit under governing law." *Fajardo Shopping Center*,

[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

S.E. v. Sun Alliance Ins. Co., Inc., 167 F.3d 1, 6 (1st Cir. 1999). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50 (1st Cir. 2000). However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Facts

On May 6, 1998, Toys and OfficeMax entered into a lease agreement wherein Toys agreed to lease as landlord and OfficeMax agreed to take as tenant a portion of the property located at 6 Bangor Mall Boulevard, Bangor, Maine. (Plaintiff's Statement of Undisputed Material Facts, "PSMF," ¶¶ 3, 4). Both parties agree that under the lease Toys agreed to make certain improvements to the property which were to be substantially completed prior to OfficeMax taking possession of the property. (PSMF ¶ 6). Toys substantially completed the physical property improvements within the terms of ¶ 5(B)(1)

of the lease prior to September 1, 1999. (PSMF ¶ 10). OfficeMax had arranged with a contractor for general construction work to commence September 7, 1999, and as of August 27, 1999 the general contractor was mobilizing and was prepared to proceed once the landlord completed its work and delivered possession. (PSMF ¶ 23). On August 31, 1999, Toys sent OfficeMax a letter, with copies to counsel, by DHL overnight delivery, notifying OfficeMax of Toys' intent to deliver possession of the property on September 1, 1999. The letter read in pertinent part, "Please be advised that pursuant to Section 1B(4) and (5), Landlord will deliver the Demised Premises to Tenant on Wednesday, September 1, 1999." (PSMF, ¶¶ 11-13).

In mid-September, 1999, OfficeMax determined that the Bangor store would not be as profitable as originally anticipated and decided on October 5, 1999, to review the lease and possibly terminate it based upon the landlord's failure to provide adequate written turnover notice. (PSMF, ¶¶ 24-27). On October 7, 1999, OfficeMax, through counsel, sent a letter to Toys notifying Toys of OfficeMax's intention to terminate the lease. The basis of OfficeMax's termination was the assertion that the Landlord had failed to deliver the premises in accordance with Paragraph 1B(5). That provision provides as follows:

> **(5) Failure to Deliver Premises**
>
> If possession of the Demised Premises is not delivered to Tenant by that date which is September 1, 1999, then either Landlord or Tenant may terminate this Lease at any time thereafter (but prior to such delivery of possession) by written notice to the other, in which event this Lease shall so terminate without any further liability hereunder on the part of Landlord or Tenant (except for Landlord to return to Tenant any moneys deposited hereunder). It is expressly agreed that cancellation as aforesaid shall be Tenant's exclusive remedy in the event Landlord fails to deliver possession of the Demised Premises to Tenant pursuant to

> the terms of this Lease, and upon the return to Tenant of any moneys deposited hereunder neither party shall be thereafter liable to the other.

On October 14, 1999, Toys' counsel requested the OfficeMax comply with its obligations under the lease. (PSMF, ¶¶ 14-16; Lease, ¶ 1B(5).

By letter dated October 25, 1999, OfficeMax's counsel argued that Toys was required to give thirty days' written prior notice of delivery of possession because it takes time for retailers to prepare for the receipt of the space. (PSMF, ¶ 17). OfficeMax's standard practice is to negotiate a provision for thirty-day or greater written notice prior to possession because of the time needed to make the space suitable for opening a new store. This written notice provision is especially important where possession is to occur during back-to-school or holiday seasons. Once written notice of possession is received, the store is "hot listed" and management is hired or relocated, merchandise ordered, advertising begun, and so forth. Typically these activities are not commenced until written notice of possession is received from the landlord. OfficeMax makes no assertions concerning the impact of deviating from the "standard practice" on the facts of this case. (Declaration of Gregory A. Darus).

Discussion

Toys and OfficeMax entered into a valid and binding lease agreement in May, 1998, obligating OfficeMax to lease property at the Bangor Mall. Paragraph 1B(5) of that agreement provides that "[i]f possession of the Demised Premises is not delivered to Tenant by that date which is September 1, 1999, then either Landlord or Tenant may terminate this Lease at any time thereafter." The termination paragraph further states that "in the event Landlord fails to deliver possession of the Demised Premises to Tenant

pursuant to the terms of this Lease" neither party shall be liable to the other. OfficeMax, focusing on the words "pursuant to the terms of this Lease," directs the Court to Paragraph 1B(4) of the lease which states that if the tenant is not in possession by September 1, 1998, the landlord "shall give Tenant at least thirty (30) days prior *written* [emphasis added] notice of Tenant's Possession Date." Toys failed to do so. Toys argues, however, that the unambiguous terms of the lease do not permit OfficeMax to terminate for failed notice, only for failure to deliver the premises by September 1, 1999. Toys also asserts that its failure to provide timely written notice of turnover is not a material breach warranting termination.

A. Unambiguous Terms of the Lease

Under Maine law, if a contract is clear, its interpretation is a question of law and can be resolved by the court. *See F.O. Bailey Co., Inc. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992). In evaluating whether contract language is clear, "the long-standing rule in Maine requires an evaluation of the instrument as a whole." *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 384 (Me. 1989). Under Paragraph 1B(5), in the event that Toys *failed to deliver possession* by September 1, 1999, either party could terminate the lease. Those words must be taken to mean what they say.

In Maine, "[i]t is well-settled that a forfeiture provision in a lease is to be strictly construed against the party seeking to enforce it, and its enforcement is not to be favored." *Rubin v. Josephson*, 478 A.2d 665, 669 (Me. 1984). Nowhere in Paragraph 1B(4) is the remedy of termination provided for failure to provide the 30 days' prior written notice. In this case the undisputed facts establish that Toys delivered possession by September 1, 1999, even though they did not provide the 30 days' prior written notice.

OfficeMax might have had a remedy under the contract for Toys breach of that promise, but it did not have the right to unilaterally terminate the contract. Were I to conclude that OfficeMax could unilaterally terminate simply for failed written notice, a new implied condition would be added where it had not existed before. The court is constrained from imposing such a condition when the unambiguous language of the contract does not provide for it. *See Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.*, 832 F.2d 214, 221 (1st Cir. 1987).

In the present case there are no disputed facts surrounding Toys delivery of possession. On September 1, 1999, the keys were available to OfficeMax. The only reason Office Max did not take possession on September 1st was its own decision not to do so. The forfeiture provision set forth at ¶ 1B(5) does not allow for termination on these undisputed facts.

B. Materiality of the Breach

Under general contract law principles a breach must be "material" before the non-breaching party is discharged from further performance and the contract is terminated. RESTATEMENT (SECOND) OF CONTRACTS § 8.15, at 489 (1998). In the present case Toys failure to provide the 30 days' prior written notice was a breach of its promise. Most often the materiality of that breach would be a question of fact for the jury. *See Gibson v. City of Cranston*, 37 F.3d 731, 736 (1st Cir. 1994) (applying Rhode Island law) ("As is true of virtually any factual question, if the materiality question in a given case admits of only one reasonable answer (because the evidence on the point is either undisputed or sufficiently lopsided), then the court must intervene and address what is ordinarily a

factual question as a question of law."). In the present case, the materiality question admits of only one reasonable answer.

OfficeMax has attempted to generate disputed facts surrounding the materiality of the failed written notice by way of an affidavit concerning its standard practices and its need as a retailer for 30 days preparation prior to possession. However, OfficeMax has generated no facts to suggest that the failure of the written notice was the reason for its decision to terminate this particular contract. Under Maine law, five general factors are applied to the facts of the particular case to determine if the non-performance was so material and important as to justify the other party in regarding the whole transaction as at an end. *See Associated Builders, Inc. v. Coggins*, 1999 ME 12, ¶ 6, 722 A.2d 1278, 1280 & n.1.

Those five general factors to be examined when making the determination of materiality are set forth below:

> (a) the extent to which the injured party will be deprived of the benefit to which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at n.1 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)). Applying these five factors to the undisputed facts in this case, it is apparent that OfficeMax's evidence concerning its "standard practices" does not generate evidence of a triable issue.

The evidence does not suggest that OfficeMax was deprived of any benefit (factor a) because it had already made arrangements to commence work at the site beginning September 7, 1999. To the extent that there were other management concerns such as advertising and arranging for store personnel as the Darus affidavit suggests, OfficeMax had the right under the contract to sue for damages (factor b) for the Landlord's breach of any of its provisions under ¶ 21H. The contract language did not give OfficeMax the unilateral right to terminate for failed written notice, but Office Max's actions deprived Toys of all benefit under the contract (factor c) after Toys had made substantial physical alterations and improvements to the property. Toys could have cured the written notice provision (factor d) if given the opportunity and OfficeMax would have been able to recover for any additional costs it incurred. OfficeMax's conduct thwarted any such attempt. Finally, OfficeMax invoked the contract provision as a technicality (factor e) only after it determined that the site would not be as profitable as anticipated. As to each of the materiality factors there simply are no disputed facts and Toys is entitled to judgment as a matter of law.

Conclusion

Based upon the foregoing, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion is DENIED. The matter will be tried to the jury on the issue of damages only.

So Ordered.

Dated this 12th day of September, 2000.

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Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-283

TOYS "R" US v. OFFICEMAX, INC Filed: 12/10/99
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Cause: 28:1332 Diversity-Contract Dispute

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